No. 77-135

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN YARMOSH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The opinion of the district court (Pet. App. A5-A19) denying, *inter alia*, petitioners' motion to suppress evidence, is reported *sub nom. United States* v. *Esposito*, 423 F. Supp. 908.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1977 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on Monday, July 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in refusing to entertain petitioner Yarmosh's motion to suppress evidence, made after the final date for pre-trial motions.

2. Whether the government's application for the interception order issued on July 10, 1975, contained the "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," required by 18 U.S.C. 2518(1)(c).

STATEMENT

On June 11, 1975, Judge Palmieri of the United States District Court for the Southern District of New York authorized the interception by the government of calls from two telephone lines in New York City. The authorization was based upon allegations, contained in the government's application and supporting affidavits, that the telephone lines were being used in furtherance of an illegal gambling business. The gambling operation under investigation was subsequently moved to a new location and Judge Carter by order dated July 10, 1975, authorized a second interception at this new location (Pet. App. A11). Petitioner Yarmosh was not named in any of the applications or orders. Conversations that implicated petitioners in the gambling operation were intercepted pursuant to the second order (Pet. 14).

Petitioners and others were thereafter indicted in the United States District Court for the Southern District of New York for conducting and conspiring to conduct an illegal gambling business, in violation of 18 U.S.C. 371 and 1955 (Pet. 12).

Petitioners Botta and Messina, on behalf of all defendants, moved before trial for suppression of the evidence the government had obtained through wire interceptions (Pet. App. A10-A11). The motion was based on several grounds, including the alleged failure of the government adequately to delineate in its applications "whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous" as required by 18 U.S.C. 2518(1)(c) (Pet. App. A13). This motion to suppress was denied on the ground, among others, that the government's supporting affidavit adequately explained why other procedures were likely to be fruitless (Pet. App. A13-A15).

On January 26, 1977, more than a month after the last day the district court set for filing pre-trial motions,[1] petitioner Yarmosh requested leave to assert additional grounds for his motion to suppress the wire interception evidence (see Pet. App. A3-A4). Yarmosh contended that *United States* v. *Donovan*, 429 U.S. 413, decided subsequent to the cut-off date, announced a new principle requiring suppression of the intercepted conversations (Pet. 17). The court denied the application because it was untimely and because Yarmosh had shown "no basis for any claim of prejudice" (Pet. App. A3-A4).

Petitioners subsequently pleaded guilty to the conspiracy count, and the substantive count was dismissed pursuant to a plea agreement (Pet. 12). With the consent of the court, petitioners reserved the right to appeal adverse pre-trial rulings (Pet. 12-13). Petitioners were each sentenced to a prison term of one year and one day. The court of appeals affirmed petitioners' convictions, but

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[1]Judge Weinfeld set December 21, 1977, as the final date for pre-trial motions by Yarmosh (Pet. 17).

remanded the judgment against petitioner Yarmosh for consideration of resentencing (Pet. App. A2).

ARGUMENT

1. A conversation to which petitioner Yarmosh was a party was intercepted on July 13, 1975, but the inventory notice of persons intercepted that the government submitted in October 1975 to the court, in accordance with 18 U.S.C. 2518(8)(d), did not include Yarmosh's name. According to the government, at the time this notice was submitted, the government had yet not recognized Yarmosh as one of the persons overheard. The court, however, was notified in August 1976, when the government had reason to suspect that Yarmosh's voice appeared on the tape.[2] See Transcript of Hearing before Honorable Edward Weinfeld, January 26, 1977 at 4-5.[3] Yarmosh was subsequently given a transcript of the intercepted conversation and the orders, applications and affidavits in the case (*id.* at 6). Yarmosh admits he suffered no prejudice as a result of the delay in informing him of the interception (Pet. 21).

Petitioner Yarmosh concedes (Pet. 18-20) that his second motion to suppress was untimely and therefore could have been entertained only for cause shown, Rule 12(f), Fed. R. Crim. P. He argues, however, that this Court's decision in *United States* v. *Donovan, supra,* rendered after the district court had initially denied petitioners' motion to suppress, announced a new rule of

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[2]Petitioner Yarmosh was not named in the order or application. Therefore a notice of the order and interception was not required to be served on petitioner pursuant to 18 U.S.C. 2518(8)(d); the judge could nonetheless direct the service of such a notice on petitioner "in the interest of justice." 18 U.S.C. 2518(8)(d).

[3]A copy of the transcript of the hearing before Judge Weinfeld on January 26, 1977, has been lodged with the Clerk of this Court.

law; that this decision constituted good cause for the late filing of his motion to suppress; and that a hearing was required to apply this new principle to his case (Pet. 18-31). Specifically, he argues (Pet. 20-28) that *Donovan* changed the law in the Second Circuit so that it was no longer necessary for him to show prejudice as a result of delay, so long as he can show deliberate failure by the government to inform the court of his identity.

Petitioner Yarmosh misinterprets *Donovan*. This Court held in that case that 18 U.S.C. 2518(8)(d) requires the government to provide the court that authorized the interception with, at a minimum, a listing of all categories of persons overheard. Further, if the government undertakes to provide the court with a list of all identified persons not named in the order or application, this list must be complete. 429 U.S. at 432. The Court held, however, that an unintentional omission of individual names in an inventory list does not require suppression of the intercepted conversations. 429 U.S. at 438-439 and n. 26.

Contrary to petitioner's assertion (Pet. 22-26), this Court expressly declined in *Donovan* to decide whether the government's omission, if intentional, would require suppression of evidence obtained through the interception. 429 U.S. at 439, n. 26. There was therefore no "new law," relating to intentional withholding of names, for the district court to apply in this case, and no need for a hearing to determine whether the government's omission of petitioner's name was intentional.[4]

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[4]Petitioner erroneously contends that the law of the Second Circuit was clearly against him on this point before *Donovan*. In fact, the circuit has not addressed the proper treatment of a case where the government intentionally withholds from the authorizing court the names of persons overheard during electronic surveillance. The cases relied on by petitioner (*United States* v. *Principie*, 531 F. 2d 1132,

Moreover, *Donovan* suggests that even where the government's actions are intentional, an individual must also show that the acts had adverse consequences for him.[5] This is a showing that Yarmosh admits he cannot make (Pet. 21).[6] The trial court, therefore, did not abuse its discretion in denying petitioner Yarmosh's untimely motion on the ground that there was no basis "for any claim of prejudice" in this case (Pet. App. A4).

2. Petitioners Yarmosh, Botta and Messina contend (Pet. 31-33) that the court of appeals' affirmance of the trial court's decision conflicts with the decision of the Ninth Circuit in *United States* v. *Kalustian*, 529 F. 2d 585. They argue that the Second Circuit has accepted, as an adequate basis for an application for wire interception,

1143; *United States* v. *Rizzo*, 492 F. 2d 443, 447, certiorari denied, 417 U.S. 944), did not raise this issue; they merely hold that the standard of review where a judge does not notify persons he has discretion to notify under 18 U.S.C. 2518(8)(d), is whether the judge abused his discretion. Even before *Donovan*, petitioner therefore could have argued that wire interception evidence should have been suppressed, and this argument would certainly not have been regarded as "frivolous," as petitioner contends (Pet. 21).

[5]This Court noted (429 U.S. at 439, n. 26) that respondents' counsel in *Donovan* conceded that the failure to mention respondents' names in the proposed inventory order was not intentional, and that "[*m*]*oreover*, respondents * * * were not prejudiced by their failure to receive post intercept notice" (emphasis added). This suggests that even when the government intentionally fails to disclose the name of a person overheard, the absence of prejudice is an independent ground for not suppressing the recording of overheard conversations.

[6]Petitioner incorrectly alleges that the decision in this case conflicts with the decision of the Eighth Circuit in *United States* v. *DiGirlomo*, 550 F. 2d 404, 407. In that case, however, appellees claimed prejudice as a result of the government's alleged intentional failure to provide their names to the court; there is no indication that the Second Circuit would not also have remanded for a hearing if that additional element had been present in this case. Cf. *United States* v. *Donovan*, *supra*, 429 U.S. at 439, n. 26.

general allegations concerning the difficulty of obtaining evidence of gambling operations, while the Ninth Circuit has held such allegations inadequate. The affidavits in this case, however, also set forth additional grounds showing the need for the interception that would meet the standards the Ninth Circuit ennunciated in *Kalustian* and subsequent cases. In addition, the district court gave no indication that if the general allegations petitioner now challenges had been the sole justification in the affidavit, it nonetheless would have found the affidavit adequate to support the order.

The Ninth Circuit in *United States* v. *Spagnuolo*, 549 F. 2d 705, has recently review *Kalustian* and subsequent cases and "tr[ied] once more to promulgate a manageable standard by which to judge affidavits under section 2518(1)(c), recognizing as we must that this statutory standard provides no sharp line * * *." 549 F. 2d at 710. The Ninth Circuit noted that *Kalustian* teaches only that an affidavit "composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with section 2518(1)(c)," and that "[w]hat is required is a showing that in the particular investigation normal investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time" (*ibid.*). If the affidavit alleges that certain techniques have not been tried because they are unlikely to succeed, the affidavit must set forth a factual history of the investigation and a description of the criminal enterprise sufficient to enable the district judge to determine independently the basis of this claim; it is not necessary, however, to establish beyond a reasonable doubt that other techniques will fail (*ibid.*).

In the present case the affidavits set forth at length the history of the surveillance and a description of the

criminal enterprise. The affidavits also indicated that physical surveillance (*e.g.*, Aff. I 24A, 26A, 28A, 32A; Aff. II 82A, 112A),[7] inspection of phone company records (Aff. I 21A, 22A, 29A; Aff. II 84A), and motor vehicle department records (Aff. I 24A), and a previous interception (Aff. II 112A) had all been used, but that nonetheless adequate information had not been obtained (Aff. II, 111A-112A). In addition, the affidavit stated that informants would not testify at trial for fear for their safety, and that without the informants' testimony there was probably insufficient evidence to obtain a conviction (Aff. II 111A-112A). Nothing in the Ninth Circuit decisions indicates that that court would not also have concluded that this affidavit adequately showed that "other investigative procedures ha[d] been tried and failed" (18 U.S.C. 2518(1)(c)), and established the need for an interception.

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[7] "Aff. I" refers to the Affidavit of William Bradbury, Jr., Special Agent, Federal Bureau of Investigation, in support of the June 11, 1975 order. "Aff. II" refers to the Affidavit of Mr. Bradbury, in support of the July 10, 1975 order. Both affidavits are contained in the Appendix for petitioners Botta and Messina in the court of appeals. Copies of these portions of the appendix have been lodged with the Clerk of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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